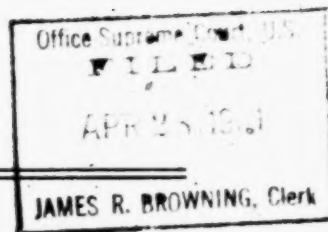


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IN THE  
**Supreme Court of the United States**

October Term, 1960

No. 495

COMMUNIST PARTY, U. S. A. and COMMUNIST  
PARTY OF NEW YORK STATE,  
*Petitioners,*

v.

MARTIN P. CATHERWOOD, as Industrial  
Commissioner.

On Writ of Certiorari to the Court of Appeals of New York

**REPLY BRIEF FOR PETITIONERS**

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**REPLY BRIEF FOR PETITIONERS**

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**I. Respondent's misapplication of Section 3 of the  
Communist Control Act.**

*A. The construction of section 3 by federal agencies.*

Our principal brief stated (Pet. Br. 26) that the Bureau of Internal Revenue has rejected respondent's construction of section 3 of the Communist Control Act and construes the section as having no effect upon the status of petitioners as employers or their liability to taxation as such.

This statement has been confirmed by the Solicitor General's letter of April 10, 1961, to the Clerk declining

the Court's invitation to intervene or file a brief *amicus curiae*. The letter states:

"There is no need to file a brief describing the practice of federal agencies in interpreting the statute, for this information is already set forth in the opinion of Judge Fuld in the New York Court of Appeals."

The passage from Judge Fuld's dissent to which the Solicitor General referred reads (R. 41):

"This contention [that the Communist Control Act terminated petitioners' status as employers and their liability to unemployment insurance taxes] is unreasonable. In the first place, it is significant that the federal authorities, admittedly aware of the Industrial Commissioner's position, have taken one diametrically opposed and continue to recognize the Communist Party as an employer subject to the Federal [Unemployment Tax] act."

It is a fair inference from the Solicitor General's letter that the position attributed by Judge Fuld to "the federal authorities" is that of the Department of Justice as well as of the Bureau of Internal Revenue.

The prevailing opinion below states (R. 38) that "there is not enough in the record to prove any binding Federal administrative construction of the Federal act." We believe with Judge Fuld that there has long been a clear federal administrative construction of section 3<sup>1</sup> and, hence, that this statement in the prevailing opinion was wrong when written. It is unquestionably wrong today in the light of the Solicitor General's letter.

Respondent's brief states that, "in the case at bar interpretation and application of the Communist Control Act devolved upon the state *in the absence of* a clear expression of policy by Federal administrative authorities"

<sup>1</sup> As we have also shown (Pet. Br. 26-28), this administrative construction has been accepted and adopted by Congress.

(Resp. Br. 61-62, <sup>a</sup>emphasis supplied).<sup>2</sup> The Solicitor General's letter negates any contention that there has been no clear and relevant federal administrative interpretation of section 3 of the Communist Control Act. Accordingly, as respondent acknowledges in the foregoing quotation, the federal interpretation is binding on the state authorities.

*B. The inapplicability of section 3 to petitioner's liability to taxation.*

Our principal brief (p. 14) pointed out that since section 3 of the Communist Control Act does not and could not have been intended to extinguish petitioners' liabilities, it did not terminate their liability to unemployment insurance taxation.

In reply to this point, respondent cites the cases holding that an activity otherwise taxable is not relieved from taxation because it is unlawful (Resp. Br. 54-56). Respondent seems to think that these cases refute our argument. In fact, they reinforce it. For under these decisions, petitioners would not have been exempted from employment taxes on the wages they pay even if section 3 had expressly prohibited them from having employees.

**II. Respondent's "criminal conspiracy" theory.**

Respondent devotes twenty pages of argument (Resp. Br. 23-43) to the proposition that the suspension of petitioners as contributing employers under the state unemploy-

<sup>2</sup> Had respondent desired a clear and authoritative statement of the Federal government's administrative interpretation of section 3 of the Communist Control Act as applied to petitioner's liability for employment taxes, he could readily have obtained one from the Commissioner of Internal Revenue. No request for such an interpretation was made because respondent did not originally base his action suspending petitioners as contributing employers on section 3. Instead, he relied on the theory stated in the Attorney General's opinion that petitioners are criminal conspirators and, hence, that it would be contrary to public policy to permit them or their employees to enjoy coverage under the state Unemployment Insurance Law. See Pet. Br. 34-35. Thus, the notion that respondent's action could be justified under section 3 was an afterthought.

ment insurance law "was justified by reason of the fact that each of the petitioners constitutes a criminal conspiracy" (*id.* 23). Respondent contends that "judicial notice [should] be taken at all stages of the proceeding of the fact that petitioners constituted a criminal conspiracy" (*ibid.*), that petitioners "are constitutionally incapable of an innocent or legal act" (*id.* 39), and therefore that they lack the capacity to be employers or to be taxed as such (*id.* 42).

This portion of respondent's argument appears to assert that there is a justification for his action which is independent of and separate and distinct from any justification supplied by section 3 of the Communist Control Act. Elsewhere in his brief, however, respondent denies that this is the case. In answering our contention (Pet. Br. 33-38) that his action, if viewed as state action, violates the Fourteenth Amendment, respondent states (Resp. Br. 79): "Insofar as the petitioners predicate a violation of due process on the lack of justification for the respondent's determination \* \* \* the respondent necessarily relies, in support thereof, on the provisions of the Communist Control Act which terminated their rights, privileges and immunities." Again, respondent states (*id.* 79-80) that the Communist Control Act, "without further implementation, statutory or otherwise, Federal or State, forced his hand in the manner in which it has moved." Moreover, these statements appear under a point which bears the caption, "The action of the State, pursuant to the mandate of the Communist Control Act, did not result in a violation of the Fourteenth Amendment" (*id.* 78).

Since respondent, in these passages, concedes that the sole justification for his action was "the mandate of the Communist Control Act", the only questions which the case presents are the construction and constitutionality of section 3 of that act.<sup>3</sup> Accordingly, respondent's conces-

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<sup>3</sup> If respondent's action was required by the mandate of the Communist Control Act, his action was not state action and presents no questions under the Fourteenth Amendment. See Pet. Br. 33.

sion makes his entire "criminal conspiracy" argument irrelevant.

Respondent's argument is not only irrelevant but patently fallacious.

There is, of course, no evidence in the record that petitioners are criminal conspirators (Pet. Br. 4-5). Respondent says that evidence was unnecessary because petitioners' guilt is a matter of judicial notice (Resp. Br. 23). As respondent acknowledges however (Resp. Br. 5, n. 10), the Court has held that where the alleged criminal character of the Communist Party is an issue in a proceeding to fasten criminal liability or a civil disability upon an individual, it must be proved by evidence.<sup>4</sup> *Yates v. United States*, 354 U. S. 298; <sup>5</sup> *Nowak v. United States*, 356 U. S. 660; *Adler v. Board of Education*, 342 U. S. 485; *Schwartz v. Board of Bar Examiners*, 353 U. S. 232. Respondent insists (*ibid.*) that these decisions are inapplicable to a proceeding against the Party itself. But the only ground he offers for the distinction is the mumbo-jumbo that petitioners "are a crime, just as burglary and arson, murder and treason are crimes" (Resp. Br. 34).

Of course, petitioners' case is no different from that of an individual. In either, a deprivation of rights without proof of the charges said to support the deprivation is a denial of due process. See Pet. Br. 30, 37-38 where we also refute respondent's contention (Resp. Br. 23, 68-69) that petitioners' failure to disprove the conspiracy charge at the hearing before the referee was a waiver of any objection to the taking of judicial notice that the charge is true.

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<sup>4</sup> Curiously, respondent makes this concession in his summary of argument but not in his argument.

<sup>5</sup> *Yates* flatly held (at 329-30) that the government had failed in its attempt to prove that the Communist Party was engaged in a criminal conspiracy.

Finally, respondent's action suspending petitioners as contributing employers could not be sustained even if he had tried and succeeded where the prosecution in *Yates* failed and had proved that petitioners are engaged in a criminal conspiracy. For even in that case, petitioners would be subject to unemployment insurance taxation at least with respect to those of their employees whose employment is innocent. Respondent seeks to escape from this obvious result with the *ipse dixit* (Resp. Br. 39) that petitioners "are constitutionally incapable of an innocent or legal act." The extravagant irresponsibility of this assertion (see Pet. Br. 36, n. 42) is matched only by respondent's further contention (Resp. Br. 72) that the Communist Party "is not protected under the Bill of Rights."

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

No. 495.—OCTOBER TERM, 1960.

Communist Party, U. S. A., et al.,

Petitioners,

v.

Martin P. Catherwood,  
as Industrial Commissioner.

On Writ of Certiorari  
to the Court of Ap-  
peals of New York.

[June 12, 1961.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

We here review the upholding by the New York Court of Appeals of the action of the New York State Industrial Commissioner terminating petitioners' registration and liability to state taxation as employers under the New York State Unemployment Insurance Law. N. Y. Labor Law 511-512, 517-518, 570, 577, 581. This determination was effected under what was conceived to be the compulsion of a federal statute, the Communist Control Act of 1954, 50 U. S. C. § 841-844, which provides, in pertinent part:

"Section 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States . . . . Therefore the Communist Party should be outlawed.

"Section 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political

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*subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof, and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: Provided, however, That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended."* (Emphasis supplied.)

New York has an "experience rating" scheme whereby employers with consistent records of high employment levels are taxed at a lower rate than would otherwise obtain. Under the Federal Unemployment Tax Act, 26 U. S. C. §§ 3301-3308, an employer is entitled to a federal tax credit for the amount paid in state unemployment taxes. If the state taxing structure allows for a reduction in tax rate to employers with good employment records under a federally certified "experience rating" system, the federal tax is nevertheless reduced by the highest rate imposed by the state, so that the employer retains the full benefit of his experience rating reduction. Thus, before the termination of their New York registration the combined federal and state tax rate of the petitioner, Communist Party, U. S. A., was 1%, and that of the petitioner, Communist Party of New York State was, according to its representations, 1.1%. The effect of the registration termination as to both was to increase the rate to the 3%, the rate provided in the federal statute.<sup>1</sup>

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<sup>1</sup> The basic federal rate was increased to 3.1% by Public Law 86-778, § 523 (c), effective 1961. 26 U. S. C. § 3301.

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We granted certiorari, — U. S. —, to consider the petitioners' claims that New York has mistakenly construed the Communist Control Act of 1954 to require termination of their status as employers under the New York statute, and contrariwise, both that § 3 of the Communist Control Act, so construed, and New York's termination of registration, infringed the Constitution of the United States.<sup>2</sup>

We must reject at the outset respondent's contention that the Court of Appeals' decision rested on a determination, based on judicial notice which was not displaced by any proof, that petitioners were not employers within the meaning of § 512 of the New York Labor Law, but a criminal conspiracy. It is entirely clear that the Industrial Commissioner and the Unemployment Insurance Referee,<sup>3</sup> the Unemployment Insurance Appeal Board,<sup>4</sup> and the Court of Appeals<sup>5</sup> all based their determination squarely on what they conceived to be the compulsion of the Communist Control Act. The Court of Appeals' amended remittitur, which states that the questions of the con-

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<sup>2</sup> Petitioners argue that the Act on its face and as applied violates the Due Process Clause of the Fifth Amendment and Art. I, § 9, cl. 3 of the Federal Constitution, which provides that "no Bill of Attainder or ex post facto Law shall be passed." Petitioners also contingently assert a Fourteenth Amendment claim, see note 6, *infra*.

<sup>3</sup> The Referee, in reviewing the administrative action of the Commissioner stated that "the Commissioner's representatives . . . urge that Congress has effectively outlawed the Communist Party and thus, by force of law, the Referee is bound to find . . . that there could not have been any valid employment. . . ." (R. 5.) This contention the Referee accepted, holding that "Congress effectively terminated the right of the Parties to enter into contracts of employment . . . ." (R. 7.)

<sup>4</sup> The Board affirmed the Referee's conclusions of law. (R. 2.)

<sup>5</sup> See 8 N. Y. 2d 77, at 83, for the opinion of Chief Judge Desmond, with whom Judge Dye concurred, and *id.*, at 90-91, for the opinion of Judge Van Voorhis, with whom Judge Burke concurred. Two judges of the court dissented, and one judge did not participate.

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struction and constitutionality of the Communist Control Act "were presented and necessarily passed upon," puts the matter beyond doubt.\*

Following the familiar rule that decision of Constitutional questions should be avoided wherever fairly possible, we turn at once to the federal statute which this Court has not heretofore had occasion to construe. Apart from unrevealing random remarks during the course of debate in the two Houses, there is no legislative history which in any way serves to give content to the vague terminology of § 3 of the Communist Control Act. The statute contains no definition, and neither committee reports nor authoritative spokesmen attempt to give any definition, to the clause "right, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the United States or any political subdivision thereof." Respondent would have us construe this language to mean that wherever a situation advantageous to the petitioners occurs by reference to the statutory or common law of a State or any other government in the United States, this is to be considered a "right," "privilege," or "immunity," and must be deemed to be withheld by the Act. On this basis New York has reasoned that liability to taxation as an employer, though not a privilege in the ordinary sense of the term, is nonetheless a recognition of the common-law contractual capacity to employ, and as such is advantageous to petitioners; and further, that an employer whose employees are unable to benefit from state and federal unemployment insurance programs will be disadvantaged in finding and keeping employees. Therefore it was thought that the Communist Control Act required termination of the registration of petitioners as employers.

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\* Petitioners also argue that if the administrative action rested upon some state procedural ground, as respondent contends, then that action violated the Due Process Clause of the Fourteenth Amendment. We do not reach this contention.

This interpretation, raising as it does novel Constitutional questions, the answers to which are not necessarily controlled by decisions of this Court in connection with other legislation dealing with the Communist Party, must, we think, be rejected. Not only does the language of the statute fall far short of compelling such an interpretation, but there are good indications that the particular result of barring petitioners as employers under state and federal unemployment insurance systems was not within the contemplation of this Act. The Internal Revenue Service has continued to collect taxes from petitioners under the Federal Unemployment Tax Act,<sup>7</sup> and Congress in 1956 has dealt in terms with a like matter, excluding from federal old-age, survivors and disability benefits, 42 U. S. C., c. 7, subchapter, II, employment with any organization required to register by the Subversive Activities Control Board and removing from the coverage of the Federal Insurance Contributions Act, 26 U. S. C., c. 21, any such organization,<sup>8</sup> thus tying the exclusion to the administrative fact findings and deter-

<sup>7</sup> The Solicitor General, in a letter to the Clerk of this Court responding to a certification by the Court to the Attorney General of the United States, that the constitutionality of a federal statute had been drawn into question in this case, stated that "there is no need to file a brief describing the practice of federal agencies in interpreting the statute [The Communist Control Act of 1954], for this information is already set forth in the opinion of Judge Fuld in the New York Court of Appeals." The dissenting opinion of Judge Fuld states that "the federal authorities, admittedly aware of the Industrial Commissioner's position, have taken one diametrically opposed and continue to recognize the Communist Party as an employer subject to the Federal act."

<sup>8</sup> 42 U. S. C. § 410 (a) (17) and 26 U. S. C. § 3121 (b) (17), Act of August 1, 1956, § 121 (c) and (d), 70 Stat. § 39. No similar exclusion, however, has been made from the coverage of the Federal Unemployment Tax Act, 26 U. S. C., c. 23, which imposes the federal tax against which the state taxes involved in this case are credited. See pp. —, *supra*.

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minations required by the Internal Security Act of 1950. ———; see *Communist Party v. Subversive Activities Control Board*, — U. S. —.

In face of these considerations we should hesitate long before attributing to Congress a purpose to effectuate the similar exclusion in this instance by legislative fiat. Our reluctance to accept a state interpretation which would have that effect is fortified both by the difficult Constitutional questions that would result, and by the undesirability of having conflicting state and federal administrative interpretations of a federal statute establishing this "coordinated and dual system" (*Buckstaff Co. v. McKinley*, 308 U. S. 358, 364) of employment insurance.

We hold that the Communist Control Act of 1954 does not require exclusion of the petitioners from New York's unemployment compensation system. Since the New York Court of Appeals' decision unmistakably rested on the contrary premise, its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE BLACK concurs in the result.